In the Supreme Court of the United States

OCTOBER TERM, 1977

77-22

No. 77-

RUTH H. BUNN, Executrix of the
Estate of Clair V. Bunn, Deceased,
Petitioner

vs.

CATERPILLAR TRACTOR COMPANY,
a corporation

vs.

ACE DRILLING COAL COMPANY, a corporation and
SOUTH FORK EQUIPMENT COMPANY, INC.,
a corporation

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Of Counsel:
EVANS, IVORY & EVANS
711 Frick Building
Pittsburgh, Pennsylvania 15219

JOHN E. EVANS, JR.
711 Frick Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner

Financial Press Corporation, Pittsburgh

INDEX

CITATIONS

Cases

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-

RUTH H. BUNN, Executrix of the Estate of Clair V. Bunn, Deceased,
Petitioner

vs.

CATERPILLAR TRACTOR COMPANY, a corporation

vs.

ACE DRILLING COAL COMPANY, a corporation and SOUTH FORK EQUIPMENT COMPANY, INC., a corporation

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

The petitioner, RUTH H. BUNN, Executrix of the Estate of Clair V. Bunn, Deceased, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 6, 1977. (R. 1)[1]

OPINION BELOW

By its Order and without a written Opinion the United States Court of Appeals for the Third Circuit, at No. 76-2083 (unreported), affirmed the judgment of the United States District Court for the Western District of Pennsylvania. Also

[1]References designated by "R." are to pages of the Appendix filed herewith.

by an Order (unreported) the Court of Appeals dismissed plaintiff's timely-filed Petition for Rehearing En Banc on May 4, 1977. The Opinion of the District Court is reported in Volume 415, Federal Supplement, page 286 (June 16, 1976). The Orders of the Court of Appeals and the Opinion of the District Court are set forth in the Appendix. (R. 1 to R. 16)

JURISDICTION

The judgment of the court below was entered on April 6, 1977. (R. 1) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTION PRESENTED

Where the state's Supreme Court, as well as its intermediate appellate and trial courts, have enunciated a basic principle of product liability law for the protection of consumers injured by defective products, and the federal courts have refused to accept and apply that law in diversity cases, is there not a serious conflict between the courts which requires a reversal of the federal appellate court's decision?

STATUTE INVOLVED

The Rules of Decision Act, 28 U.S. C. §1652 (1), Act of June 25, 1948, c. 646, §1, 62 Stat. 869, is as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

This diversity action is a products liability suit which arises out of the death of Clair V. Bunn on October 11, 1973, in Pennsylvania. (439a)[2] While he was at work on a coal loading dock, a large material moving machine known as a front wheel loader backed over and killed him. (157a, 158a, 168a) The operator did not see Bunn as he proceeded backwards. The machine was designed to move forward and backward at a high speed. (70a) It was manufactured and sold by Caterpillar Tractor Company and was being used for an intended purpose. (9a, 15a, 70a) This action was brought against Caterpillar by Bunn's widow-executrix, on the ground that the wheel loader was defective, because it was not equipped with safety devices which would have prevented the fatal occurrence. (91a-100a) It was sold without a noise device which would activate to give warning of its backward movement (14a-15a, 45a, 213a, 368a); it did not provide the operator with rear-view mirrors, so that he could observe persons located behind the machine (11a-16a, 45a, 329a); and it was so designed that exhaust pipes unnecessarily screened the operator's view to the rear. (215a)

Plaintiff's case, in this diversity action, rested on the state law that a manufacturer-seller is liable in damages if it is established (1) that the product was defective when sold and (2) that the defect was a legal cause of the injury. (404a-405a) Although a plaintiff must establish the existence of a defect, it is improper to require him to prove that the defect caused the whole machine to be unreasonably dangerous.

The trial court submitted a special interrogatory to the jury asking if the wheel loader was 'defective.' (409a) The answer was "no." However, in the Court's instructions, he defined the word "defect" by limiting it to such a defect as

---

[2]References designated by "a" are to pages of the Appellant's Appendix in the Third Circuit Court appeal.

would render the product "unreasonably dangerous." (411a-412a, 414a, 416a) The jury's answer determined that the defect in the machine which caused the fatal accident was not of that magnitude. Exceptions to the instructions were duly taken. (31a-32a, 390a, 432a)

In her motion for a new trial, plaintiff complained that the instructions given were in conflict with the substantive law of the state (441a), which does not require that an injured party prove that the *defect* in the product which caused the accident made the product "unreasonably dangerous." In its Opinion refusing to grant a new trial the District Court insisted that to recover the plaintiff must prove that the machine was made unreasonably dangerous by the defect. (R. 7)

On appeal to it, the Circuit Court sustained the judgment of the lower court, without oral argument or written opinion. (R. 1) Plaintiff's motion for a rehearing before the court en banc was likewise denied without opinion. (R. 2)

The cross-claim between Caterpillar and the third-party defendants does not involve the issues raised in this petition.

REASONS FOR GRANTING THE WRIT

I. This Court should reverse the action of a Circuit Court which, in a series of diversity cases (including the present one), has refused to follow the state's substantive law, as set forth by its Supreme Court.

Under state law Petitioner was not required to prove that the defect in the machine made the vehicle unreasonably dangerous, but only that it caused her husband's death. The Third Circuit refused to recognize or apply this law and, as a result, the widow was deprived of recovery for her husband's death.

The defect in the front wheel loader upon which plaintiff based her case was its lack of adequate safety devices to protect persons behind the machine when it traveled in reverse.[3]

Under the state law a product or strict liability action is "governed by the evidentiary standards of warranty law, not by evidentiary standards of negligence law." *Agostino v. Rockwell Manufacturing Co.*, 236 Pa. Superior Ct. 434, 345 A.2d 735, 738 (September 22, 1975). Under this law a manufacturer "is effectively the guarantor of his products' safety." By marketing and advertising the product he "impliedly represents that it is safe for its intended use." He can not "avoid responsibility for damages caused" by a defect in it. *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903, 907 (1974).

In the case of *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), the state adopted the law of strict liability as set forth

[3]There has been no question in this case about the rule that a product which lacks safety devices is defective. *Bartkewich v. Billinger*, 432 Pa. 351, 247 A.2d 603 (1968); *Capasso v. Minster Machine Co., Inc.*, 532 F.2d 952 (1976). Other cases involving the same or similar defects in heavy construction machinery are: *Pike v. Hough Co.*, 2 C. 3d 465; 85 C. Rptr. 629; 467 P. 2d 229 (Calif., 1970). *Henderson v. Harnischfeger Corp.*, 12 C. 2d 663; 527 P. 2d 353 (1974). *Wirth v. Clark Equipment Co.*, 457 F.2d 1262 (9th Cir., 1972).

in Section 402A, Restatement of the Law (Second) of Torts. This section renders a seller liable for harm to a user of a product which is "in a defective condition, unreasonably dangerous," although "the seller has exercised all possible care in the preparation and sale of his product."

By its later decisions, the state courts substantially modified and altered the law as stated in 402A. They recognized that the true basis for strict liability is a warranty standard and that it is inconsistent to inject any negligence or reasonable man standards in the law's application. The protection of the consumer was broadened by eliminating the requirement that the injured user prove that the defect causing his injury was so serious that it rendered the product "unreasonably dangerous."

The Third Circuit, in the present case, as well as in three other recent decisions,[4] has refused to follow and apply the liberalized law of the state.

The pertinent state law which governs the Petitioner's cause of action has been set forth in the case of *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (May 19, 1975).

In the Opinion it is stated:

> "Strict liability requires, in substance, only two elements of requisite proof: the need to prove that the product was defective, and the need to prove that the defect was a proximate cause of the plaintiff's injuries." (p. 898)
>
> • • • • •
>
> "The plaintiff must still prove that there was a defect in the product and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous. It is therefore unnecessary and improper to charge the jury on 'reasonableness.' *Cronin*, supra; *Glass*, supra." (p. 900)

[4] *Bair v. American Motors Corp. v. McAden*, 535 F.2d 249 (3rd Cir., 1976); *Greiner v. Volkswagenwerk Aktiengeselleschaft, et al.*, 540 F.2d 85 (3rd Cir., 1976); *Posttape Associates v. Eastman Kodak Co.*, 537 F.2d 751 (3rd Cir., 1976).

By the *Berkebile* decision (p. 900) this state brought itself into line with the products liability law of California and New Jersey.

> "*Cronin v. J. B. E. Olson Corp.*, 8 Cal. 3d 121, 132-33, 104 Cal. Rptr. 433, 441, 501 P.2d 1153, 1161 (1972); *in accord, Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973)."

The Superior Court of Pennsylvania, an intermediate appellate tribunal, recognizes that *Berkebile* is the law of Pennsylvania and must be followed by lower state courts. It unanimously affirmed (in a per curiam Opinion) the Common Pleas Court's decision in *Azzarello v. Black Bros. Co., Inc.*, et al., 240 Pa. Superior Ct. 756, 359 A.2d (1976). (R. 18, R. 17)

In *Azzarello* the lower court had held[5] that under the *Berkebile* rule a party injured by a defective product is not required to prove that the defect rendered the product "unreasonably dangerous," and that it had committed reversible error in instructing the jury that plaintiff had such a burden. (R. 17)

The Superior Court again recognized the *Berkebile* decision as the governing law in this state, in the case of *Lenkiewicz v. Lange*, et al., 242 Pa. Superior Ct. 87, 363 A.2d 1172 (September 27, 1976).

[5] The lower court Opinion is unreported. It is No. 924 April Term, 1972, Common Pleas Court of Allegheny County, Pennsylvania. Excerpts are included in this Appendix (R. 17) Pending decision of the present case in the Circuit Court, the state Supreme Court allowed an appeal in *Azzarello*. Reargument has not taken place. The Circuit Court was informed of the grant of appeal (R. 19), but did not delay its decision to await the Supreme Court's determination.

The Court said (p. 1175):

> "It is well settled that in order to establish a cause of action for breach of warranty or for strict liability under §402A, the plaintiff must prove that the product was defective at the time that the seller delivered it to the buyer, and that the defect caused the plaintiff's harm. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975)."

In a footnote (p. 1175) the majority Opinion recognizes that *Berkebile* is a decision of the Supreme Court. The footnote is as follows:

> "In *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975), our supreme court held that '[t]he seller must provide with the product every element necessary to make it safe for use.' 462 Pa. at 337 A.2d at 902."

A concurring Opinion was written by Judge Hoffman and he, too, follows and applies *Berkebile*. He said (p. 1177):

> " 'Strict liability [under 402A] requires, in substance, only two elements of requisite proof: the need to prove that the product was defective and the need to prove that the defect was a proximate cause of the plaintiff's injuries.' *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 898 (1975)."
>
> • • • • •
>
> "Thus, it is clear from Pennsylvania case law that the plaintiff in a breach of warranty of (or) §402A case need only prove a prima facie case to reach the jury. *Berkebile v. Brantly Helicopter Corp.*, supra."

In another product liability decision filed July 15, 1976, *Cornell Drilling Co. v. Ford Motor Co.*, 241 Pa. Superior Ct. 129, 359 A.2d 822 (1976), the Superior Court recognized that the trial court had properly applied the product liability law as enunciated in *Berkebile*. It said (p. 825):

> "As correctly observed by the lower court, for appellant to submit his case to the jury on the theory of strict liability under §402A of the Restatement (Second) of Torts (1965), it was necessary to 'prove that the product was defective, and . . . that the defect was a proximate cause of the plaintiff's injuries.' *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 95, ___, 337 A.2d 893, 898 (1975)."

Several years ago the state Supreme Court appointed a committee to draft standard jury instructions. In its Subcommittee Draft of June 6, 1976, it prepared an instruction in which it defined the word "defect" in product liability cases. It said the lack of "any element necessary to make it safe for use or contained any condition that made it unsafe for use, then the product was defective, and the defendant is liable for all harm caused by such defect." (R. 20)[8] In its notes the Subcommittee states that *Berkebile* is the law and that the District Court Opinion in *Beron v. Kramer-Trenton Co.*, 402 F. Supp. 1268 (E.D. Pa., 1975), does not follow Pennsylvania law; but, instead, it ignores the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 Supreme Ct. 817, 82 L. Ed. 1188 (1938). [Excerpts from the Subcommittee's Draft and Notes are a part of the Appendix. (R. 21)]

The lower state courts have clearly recognized that *Berkebile* is an opinion of the Supreme Court and the law of this state. This is in contradistinction to the Third Circuit's holdings in other cases, that *Berkebile* should be ignored, because a majority of the justices concurred in the decision, but not in the Opinion.

---

[8]The draft of proposed instructions has not been officially adopted. They have been followed by the trial courts and cited with approval by the Pennsylvania Superior Court. *Kenworthy v. Burghart*, 241 Pa. Superior Ct. 267, 361 A.2d 335 (1976); *Willinger v. Mercy Cath. Med. Ctr.*, 241 Pa. Superior Ct. 456, 362 A.2d 280, 286 (1976).

II. A decision by the state's Supreme Court, filed subsequent to the Circuit Court's decision, makes it clear that the law applied by the Circuit Court is in conflict with the state law enunciated by the Supreme Court.

The later Supreme Court products liability decision, which confirms that the law as enunciated in *Berkebile* is the law of this state, was filed April 28, 1977 and is *Francioni v. Gibsonia Truck Corp.*, ___ Pa. ___, 372 A.2d 736 (April 1977). While *Berkebile* is not referred to by name, its rule is restated by a unanimous Supreme Court as follows:

> "After a complete review of the record, we find that there is evidence which, if believed, would support a finding that a component part or parts of the steering mechanism of the White truck was defective, that this defect existed at the time the truck left the hands of the lessor and that this defect, in fact, was a legal cause of appellant's injuries."(p. 740)

Francioni ruled that the case is for the jury and it does not place upon plaintiff the burden of proving that the defect rendered the product unreasonably dangerous.

The state Supreme Court in *Berkebile*, as confirmed in *Francioni*, has ruled that a party injured by a product is required to prove only that the product was defective when sold, and that the defect was a legal cause of his injury. In disregard of *Erie R. Co. v. Tompkins*, supra, p. 9, the Third Circuit insists that in diversity cases the injured party has a substantial third burden of proof, namely, to establish that the defect alleged had rendered the article unreasonably dangerous.

Under the present unfortunate conflict of decisions, an injured party's recovery will largely depend upon whether his case is processed in the state or federal court. This Court has ruled, since *Erie*, that such an unjust and undesirable conflict is intolerable. It should not be permitted here. It was

said in *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 Supreme Ct. 176, 179, 85 L. Ed. 109 (1940):

> "It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."

> "The Rules of Decision Act commands federal courts to regard as 'rules of decision' the substantive 'laws' of the appropriate state.....And the Erie R. Co. case decided that 'laws,' in this context, include not only state statutes, but also the unwritten law of a state as pronounced by its courts." *King v. Order of United Commercial Travelers*, 333 U.S. 153, 68 Supreme Ct. 488, 491, 92 L. Ed. 608 (1948)

The Rules of Decision statute is as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. §1652 (1), Act of June 25, 1948, c. 646, §1, 62 Stat. 869.

See also: *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487, 61 Supreme Ct. 1020, 85 L. Ed. 1477 (1941)

III. The Circuit Court has refused to follow the decisions of this Court which require federal courts, in diversity actions, to follow the law as stated by the lower state courts, if the state's Supreme Court has not spoken on the subject.

Assuming for argument's sake that *Berkebile* is not an opinion of the Supreme Court, and that *Francioni* had not been decided, the law of the state has, nevertheless, been stated in binding form by the decisions of the state's Superior

Court and its trail courts. We refer to *Azzarello*, supra, p. 7; *Lenkiewicz*, supra, p. 7; and *Cornell Drilling*, supra, p. 8. These lower court decisions adopt the principles that were included in *Berkebile*, that a party injured by a defective product is not required to prove that the defect rendered the product unreasonably dangerous, in order to recover for the injuries sustained.

The Pennsylvania Superior Court is the court of final appeal in trespass actions, unless the Supreme Court grants an appeal from its judgment. (Pennsylvania "Appellate Court Jurisdiction Act of 1970," Act of July 31, 1970, P.L. 673; 17 P.S. 211.302) Its statements of substantive law are binding, not only on the state trial courts, but, in the absence of a Supreme Court decision, upon the federal courts.

The conflict in the decisions of the federal and state courts on the matter in issue in this case is clear and definite.

The District Court Judge, in the present case, instructed the jury as follows:

> "Now, the principle applies where the product is, at the time it leaves the seller's hand, in a condition not contemplated by the ultimate consumer which would be unreasonably dangerous to him." (412a)
>
> • • • • •
>
> "Now, the Plaintiff has the burden of establishing that the defective condition existed and that that defective condition was unreasonably dangerous....." (416a)
>
> In his Opinion (R. 7) refusing a new trial, he said:
>
> "'Unreasonably dangerous' is still the law in Pennsylvania in this type litigation, and we believe the Plaintiff here was rightfully held to that burden."

By its affirmance without written opinion, the Circuit Court approved the lower court's decision. (R. 1)

The Third Circuit had said, in *Bair v. American Motors Corp. v. McAden*, supra, fn. p. 6, that it accepts the reasoning

of the *Beron* case, supra, p. 9, and *Berkebile* is "not the law of Pennsylvania." (p. 250) No reference was made to the law as enunciated in the state Superior and the trial court decisions on the subject.

In *Posttape Associates v. Eastman Kodak Co.*, supra., fn. p. 6, the Circuit Court said that the product involved was "defective" but "by no stretch of the imagination could it be considered 'unreasonably dangerous.'" (p. 755) In denying recovery it dismisses *Berkebile* by stating that in it some members of the court "questioned the necessity of proving an 'unreasonably dangerous' condition, despite the language in the Restatement." (p. 754) Again, no reference was made to state Superior or trial court decisions.

In *Greiner v. Volkswagenwerk Aktiengeselleschaft*; supra, fn. p. 6, the Circuit Court said that *Berkebile's* "...weak precedential value does not permit us to find an 'unequivocal rejection' of the unreasonably dangerous concept in Pennsylvania." (Citing: *Bair, supra and Beron*, supra) (p. 95).

This court said in *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 61 Supreme Ct. 179, 85 L. Ed. 139 (1940), that the object of the Judiciary Act of 1789 "..... to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts....would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken." (p. 183)

It then ruled that a federal court "is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable." The Court continued by stating that it is the duty of the federal court "in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule...." (p. 183)

The Court, speaking through Mr. Justice Stone (later Chief Justice), continued:

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." (p. 183)

This same rule has been applied in numerous other decisions.[7]

The issue in conflict is of major importance in the expanding field of product liability litigation. The Circuit's obstinate refusal to acknowledge *Berkebile* as state law, or to recognize the law set forth in the decisions of the state's intermediate and lower tribunals, has resulted in a situation where an injured party's right of action and recovery depend upon whether his case is tried in the state or in the federal court.

Only this Court can remedy this unjust and extremely undesirable situation, which is of vital importance, not only to the Bunn widow, but to many persons with product liability actions whose cases may be processed in the federal court.

By the Circuit Court's offering defendants in diversity product liability cases a substantial additional opportunity of success, a resulting transfer of such cases from the state to the district courts in increasing their case load burden.

---

[7] *Fidelity Union Trust Co. v. Field*, supra, p. 14; *Six Companies of California v. Joint Highway District*, 311 U.S. 180, 61 S.Ct. 186, 85 L. Ed. 114 (1940) and *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 61 Supreme Ct. 336, 85 L.Ed. 284 (1940).

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JOHN E. EVANS, JR.,
711 Frick Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2083

RUTH H. BUNN, Executrix, Estate of
Claire V. Bunn, Deceased,
Appellant

v.

CATERPILLAR TRACTOR CO., a corporation
deft & 3rd pty plf.

v.

ACE DRILLING COAL CO., a corp.
SOUTH FORK EQUIPMENT COMPANY, INC. a corp.
3rd pty defts.

(D. C. Civil No. 74-637)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted under 3rd Cir. Rule 12(6) April 1, 1977
Before VAN DUSEN, GIBBONS and GARTH,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court:

VAN DUSEN
Circuit Judge

Dated: April 6, 1977

Attest:

THOMAS F. QUINN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2083

(D. C. Civil No. 74-637)

RUTH H. BUNN, Executrix, Estate of
Clair V. Bunn, Deceased,
Appellant

v.

CATERPILLAR TRACTOR CO., a corporation
deft & 3rd pty plf.

v.

ACE DRILLING COAL CO., a corp.
SOUTH FORK EQUIPMENT COMPANY, INC. a corp.
3rd pty defts.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

VAN DUSEN
Judge

Dated: May 4, 1977

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUTH H. BUNN, Executrix of the Estate of Clair V. Bunn, Deceased,
Plaintiff

v.

CATERPILLAR TRACTOR COMPANY, a corporation,
Defendant

v.

ACE DRILLING COAL COMPANY, a corporation,
Third Party Defendant

Civil Action No. 74-637

OPINION

SNYDER, *J.*

Presently before the Court is Plaintiff's Motion for New Trial for alleged errors which occurred during the Trial and in the Court's Charge. The Motion will be denied.

I. BACKGROUND.

This action arises out of a claim for damages for the death of Clair V. Bunn on October 11, 1973. Bunn, a supervisor for Ace Drilling Company (Ace), was directing coal loading operations at Ace's Lilly Loading Dock when he was run over by a Caterpillar 988 Front Wheel Loader, manufactured by the Defendant, Caterpillar Tractor Company (Caterpillar). The machine was originally sold to Cecil I. Walker Company of West Virginia on January 28, 1969, but at the time of the accident it was owned by South Fork Equipment Company, who had leased it to Ace.

Ruth H. Bunn, wife of the deceased, brought this action alleging that the 988 was defectively designed at the time it

was sold by Caterpillar since it was not equipped with adequate safety devices (specifically, rear view mirrors and a backup alarm) and the exhaust pipe and air precleaner mounted behind the driver's seat obstructed the view of the driver to the rear.

The case was tried before a jury which answered the first special interrogatory[1] as follows:

"1. Was the Caterpillar 988 Wheel Load in a defective condition at the time it was sold by Caterpillar Tractor Company to Cecil I. Walker Company, West Virginia, on January 28, 1969?

ANSWER 'YES' OR 'NO': NO"

[1]The Special Verdict Slip submitted to the jury read as follows:

"1. Was the Caterpillar 988 Wheel Loader in a defective condition at the time it was sold by Caterpillar Tractor Company to Cecil I. Walker Company, West Virginia, on January 28, 1969?

ANSWER 'YES' OR 'NO': _____

IF YOUR ANSWER TO QUESTION NO. 1 IS 'YES', ANSWER QUESTION NO. 2. IF YOUR ANSWER TO QUESTION NO. 1 IS 'NO', SIGN THE NEXT PAGE AND RETURN THIS DOCUMENT TO THE COURT.

2. Was that defective condition a proximate cause of the injury and death of Clair V. Bunn on October 11, 1973?

ANSWER 'YES' OR 'NO': _____

IF YOUR ANSWER TO QUESTION NO. 2 IS 'YES', ANSWER QUESTION NO. 3. IF YOUR ANSWER TO QUESTION NO. 2 IS 'NO', SIGN THE NEXT PAGE AND RETURN THIS DOCUMENT TO THE COURT.

3. Did Clair V. Bunn voluntarily and intentionally assume the risk of a known danger which brought about his injury and death on October 11, 1973?

ANSWER 'YES' OR 'NO': _____

IF YOUR ANSWER TO QUESTION NO. 3 IS 'YES', SIGN BELOW ON THIS PAGE AND RETURN THIS DOCUMENT TO THE COURT. IF YOUR ANSWER TO QUESTION NO. 3 IS 'NO', ANSWER QUESTION NO. 4.

4. Was Ace Drilling Coal Company negligent at the time of the accident on October 11, 1973?

ANSWER 'YES' OR 'NO': _____

(continued)

I. DISCUSSION

A. The "Berkebile" Contention

Plaintiff contends that this Court erred in not using the language of the Pennsylvania Supreme Court in *Berkebile v. Brantly Helicopter Corp.*, ___ Pa. ___, 337 A.2d 893 (1975), deleting "unreasonably dangerous" from Section 402A.[2] Plaintiff contends that decision, written by two Justices and in which three other Justices concurred with the result only, and two other Justices filed separate concurring opinions, changed the Pennsylvania law on 402A so that a plaintiff need not prove a defective product was unreasonably dangerous.

This Court charged the jury as follows:

"Now, the principle applies where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer which would be *unreasonably dangerous* to him." (T. 80)

* * * * *

IF YOUR ANSWER TO QUESTION NO. 4 IS 'YES', ANSWER QUESTION NO. 5. IF YOUR ANSWER TO QUESTION NO. 4 IS 'NO', SIGN BELOW ON THIS PAGE AND RETURN THIS DOCUMENT TO THE COURT.

5. Was the negligence of Ace Drilling Coal Company a proximate cause of the injury and death of Clair V. Bunn on October 11, 1973?

ANSWER 'YES' OR 'NO': _____

IF YOUR ANSWER TO QUESTION NO. 5 IS 'YES', ANSWER QUESTION NO. 6. IF YOUR ANSWER TO QUESTION NO. 5 IS 'NO', SIGN BELOW ON THIS PAGE AND RETURN THIS DOCUMENT TO THE COURT.

6. Was the negligence of Ace Drilling Coal Company a superceding cause of the injury and death of Clair V. Bunn on October 11, 1973?

ANSWER 'YES' OR 'NO': _____."

[2]See "Defective Standard of Section 402A of Restatement (Second) Torts Questioned. *Berkebile v. Brantley Helicopter Corp.*, ___ Pa. ___, 337 A.2d 893 (1975)", 80 Dick. L. Rev. p. 633 (1976).

"Now, the whole matter of defective condition arises when you can find either by design or manufacture — and there is no evidence about manufacturing defects in this case — that the product itself was designed in a way to make it *unreasonably dangerous* to the user or consumer." (T. 82)

• • • • •

"Again, to summarize, by defective condition we mean a condition not contemplated by the ultimate user and which condition is *unreasonably dangerous* to him and which presents a hazard...." (T. 82)

• • • • •

"Now, the Plaintiff has the burden of establishing that the defective condition existed and that that defective condition was *unreasonably dangerous*...." (T. 84)

At the hearing on this Motion, Plaintiff's counsel strenuously argued that this Court deliberately ignored Pennsylvania law as expressed in *Berkebile* by holding the Plaintiff to the burden of proving that this 988 Wheel Loader was unreasonably dangerous to the user or consumer.

This Court followed the lead of Judge Daniel H. Huyett, III in *Beron v. Kramer-Trenton Co.*, 402 F.Supp. 1268 (E.D.Pa. 1975), in which he stated (at p. 1277):

"... the views expressed in Chief Justice Jones' opinion in *Berkebile* are not the law of Pennsylvania, and that it is proper to instruct a jury that it must find a defective condition be unreasonably dangerous to the user or consumer."

The Third Circuit approved that decision in *Bair v. American Motors Corporation* (D.C. Civil No. 68-166, decided May 17, 1976) (Slip Opinion, p. 2), stating:

"Commonwealth v. Little, 432 Pa. 256, 248 A.2d 32 (1968), declined to follow a prior opinion representing the views of only two justices; the Supreme Court of Pennsylvania there reasoned that an opinion 'joined by only one other member of this Court has no binding precedential value.' *Ibid.* at 260, 248 A.2d at 35. Applying the rationale of *Little* to the *Berkebile* situation, we are constrained to accept the reasoning set forth [in the Beron case, supra.]..."

"Unreasonably dangerous" is still the law in Pennsylvania in this type of litigation, and we believe the Plaintiff here was rightfully held to that burden.

B. The Points For Charge

Plaintiff contends that the Court should have approved the following Points for Charge which were submitted:

"3) The defendant manufacturer-seller is required to provide every element necessary to make its product safe for use."

"4) The defendant manufacturer-seller is effectively the guarantor of the safety of its product."

"5) If the Caterpillar 988 Loader, at the time it was sold, did not contain adequate safety devices for the protection of persons working around the machine, the jury must find that the product was defective."

"10) The plaintiff Executrix is entitled to recover against defendant Caterpillar if she shows sufficient facts to allow the jury to infer that the Caterpillar 988 Loader was not equipped *with adequate safety devices* at the time it was sold by Caterpillar, and that this was a substantial factor in producing Clair V. Bunn's fatal injuries."

The Restatement 2d of Torts, §402A, adopted in Pennsylvania in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), reads:

"One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer...."

Plaintiff's Points 3 and 10 ignore the fact that the test to determine liability of the seller is not whether the product is safe, but rather, according to 402A, whether it is "unreasonably dangerous". Point 4, although it follows the language in *Salvatore v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974), is taken out of context and if read to the jury as submitted by the Plaintiff, would fail to properly instruct the jury that the product must be sold "in a defective condition" for the seller to be liable. *Restatement of Torts* §402A. Point 5 also fails to instruct the jury that the lack of adequate safety devices must be such that the machine must be "unreasonably dangerous" for the seller to be liable for its defect.

C. The Definition of "Unreasonably Dangerous"

Plaintiff objects to the inclusion of the language defining defective condition in terms of "unreasonably dangerous" in the Court's Charge to the jury. In speaking of defective condition, the Court charged as follows (T. 82):

> "Now, the whole matter of defective condition arises when you can find either by design or manufacture — and there is no evidence about manufacturing defects in this case — that the product itself was designed in a way to make it *unreasonably dangerous* to the user or consumer. And counsel has stated to you, and correctly so, that the lack of a proper safety device can, if you so find, constitute a design defect, but it is for you to say whether or not the Plaintiff has in fact established by a fair preponderance of the evidence that there was a designed defect on those particular aspects alleged in the claim in this case. Again, to summarize, by defective condition *we mean a condition not contemplated by the ultimate user and which condition is unreasonably dangerous to him* and which presents a hazard beyond that which would be contemplated by the ordinary consumer who purchases it and with the ordinary

> knowledge common to the user community as to its characteristics. . . ."

Plaintiff contends that this language is the kind that "rings in negligence" and is therefore inappropriate in strict liability cases. We direct Plaintiff's attention to the language in *Beron v. Kramer-Trenton Company, supra* (at pp. 1273-1274):

> "...First, an examination of Pennsylvania appellate decisions interpreting §402A reveals that the text and the comments, including in particular comments g, h and i, have been solidly engrafted into Pennsylvania law without reservation. In the absence of an unequivocal rejection of any specific aspect of §402A by a majority of the Pennsylvania Supreme Court we hesitate to impute such an intention to that Court, sitting as we do in our capacity as a federal diversity court interpreting Pennsylvania law. Second, we believe that the phrase 'defective condition unreasonably dangerous to users' is a unitary concept and that the purpose of the draftsmen would be frustrated by severing it from 'unreasonably dangerous' without substituting another suitable phrase which tends to clarify the meaning of 'defective condition.' In our view the inclusion of 'unreasonably dangerous' serves two overlapping functions in the §402A formulation of strict liability. We believe it denotes that the draftsmen of the Restatement intend to foreclose the possibility that 'defective condition' might be construed to include any characteristic of a product capable of inflicting injury. In addition, is[sic] signifies that jurors should not resort to their intuitive understanding of 'defective condition' but rather that they should be guided by an objective standard based on community expectations of product safety." [Error in original] [Footnote omitted]

The language used in the Charge was given in an effort to provide the jury with an objective criteria for determining "defective condition" and is correct.

D. The Expert Testimony

At the trial, Plaintiff offered to have her expert witness testify that he had seen and had photographs of a Caterpillar 988 Front Wheel Loader with the air precleaner and exhaust pipe mounted in the manner which he recommended to reduce the blind spots. The offer was refused and Plaintiff now contends that evidence would show the feasibility of the design changes recommended.

As stated in *Bowman v. General Motors Corporation*,64 F.R.D. 62 (E.D.Pa. 1974) (at p. 70):

> "...Evidence of subsequent design modifications and indeed even post-accident precautions are admissible: (1) to refute the position that the existing condition was incapable of improvement, or to demonstrate that precautions were feasible before the injury; or (2) to show that the defendant knew or should have known of a reasonably foreseeable danger yet failed to give notice thereof."

See also, Sterner v. U.S. Plywood-Champion Paper, Inc., 519 F.2d 1352 (8th Cir. 1975).

This Court excluded Plaintiff's offer because the offer as given *was not relevant to the issue of the feasibility of the design changes*. There was nothing in the offer to show that the changes in the 988 seen by the expert or on the 988 in the photo *were either functionally or economically feasible*. There was nothing to show whether or not the changes were a result of a special order to perform a particular function or to show that they even worked.

The predicate to the admissibility of such evidence would have been the circumstances under which the changes in the 988 observed had been brought about. In the absence of such proof, *the offer was irrelevant*.

E. Restrictions On Treatises

The Plaintiff offered to read into evidence various articles (including one by the National Safety Council and one by a Safety Engineer from General Dynamics) which it's expert, Dr. Purkupile, stated he consulted in formulating his opinion. After examining the articles and conferring with counsel, this Court allowed the Plaintiff to read relevant portions of those articles to the jury. Plaintiff now contends that this Court erred in not allowing the reading of the lengthy articles in their entirety to the jury.

The Court exercised its authority under Rule 403 of the Federal Rules of Evidence[3] in limiting the relevant evidence as contained in the lengthy treatises. To have allowed more would have unnecessarily bogged down the trial with repetitious, time-wasting testimony.

F. The Use Of Regulations

Plaintiff was allowed to read to the jury relevant portions of the Manual of the Corps of Engineers, United States Army, entitled, "General Safety Requirements". In addition, Plaintiff read into evidence certain regulations of the Occupational Safety and Health Administration and the Mining Enforcement and Safety Adminstration relating to pertinent safety devices on machinery such as a wheel loader. The argument is now made that this Court completely negated the effect of these regulations by its Charge to the jury.

Specifically, the Court stated (T. 81-82):

> "You are particularly cautioned to recall that the Court instructed you with respect to various rules and regulations requiring back-up mirrors and audible signaling devices. These rules and regulations were not

[3] "Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

to be considered as imposing a legislative standard of conduct upon any one other than the user or consumer, which in this case is Ace.

Within the facts of this case, the Plaintiff contends that the product, the 988 Caterpillar, was *unreasonably dangerous* when it left the hands of Caterpillar, and this is a question of fact for you to determine as to Caterpillar without regard to these safety rules and regulations except as you may decide they determine a standard of conduct and which you would then apply to the manufacturer. *They do not apply to the manufacturer under the persons to whom the rules and regulations were issued.* And as I said, I think you realize when I talk about the consumer or user I am referring to Ace Drilling Company and its employees, including Mr. Bunn."

In accordance with that Charge, this Court approved Defendant's Points for Charge Nos. 6 and 7:

"6. You have heard the testimony in this case about OSHA and MESA regulations. I instruct you that those regulations do not apply to Caterpillar Tractor Company and Caterpillar Tractor Company was not under any obligation to obey those regulations."

"7. You have heard the testimony in this case about a regulation of the United States Corps of Army Engineers. I instruct you that the regulation does not apply to Caterpillar Tractor Company in this case."

This Court agrees with the Plaintiff's contention that safety codes are admissible in evidence to support a claim that a given design is hazardous, even though the codes have no binding effect on the Defendant. However, *the purpose to which they may be put in a 402A strict liability case is not as clear.*

In *Smith v. Hobart Manufacturing Co.*, 191 F.Supp. 530 (E.D. Pa. 1961) [reversed and remanded on other grounds, 302 F.2d 570 (3d Circ. 1962)], the plaintiff brought suit against the manufacturer of a meat grinder for alleged negligence in not designing a machine to include known safety devices. There, the plaintiff introduced into evidence the General Safety Law (43 P.S. §§25-1 through 25-15) and the Regulations of the Department of Labor and Industry which provided safety standards to be followed in places of employment in Pennsylvania. The defendant there objected to the use of the Safety Law and the Regulations, claiming that they did not apply to the manufacturer but to the employers. At the trial, the judge instructed the jury (at p. 532):

"...that they could consider the Safety Law and the Regulations of the Department of Labor and Industry *as a factor* in their deliberations when they were deciding whether the design of the Hobart grinder was reasonably safe...."[Emphasis supplied]

The jury was instructed as to all the other elements of the law of negligence and not merely that if they found a violation of the Law and Regulations, the defendant would be liable.

As the Court stated in reviewing the trial (at p. 533):

"...this was an ordinary negligence action in which the General Safety Law and the Regulations were before the jury as evidence of the considered judgment of the Commonwealth of Pennsylvania as to the safety features of the design necessary to make a meat grinder a reasonably safe machine."

The action *sub judice* is admittedly not one of negligence, but is one claiming 402A strict liability. The jury in this case was not determining the Defendant's negligence but rather, in accordance with Comment i of the Restatement, they had to determine if the Defendant was strictly liable for selling a defectively designed machine. The juries in both cases, however, could consider Regulations which

set forth safety standards for people other than defendants. The juries in both cases had to reach a conclusion as to whether the machines in their respective cases were "*reasonably safe*" or "*unreasonably dangerous*". In both cases, they were allowed to used the Regulations *as a factor* in their ultimate decisions.

In a similar case involving the same Department of Labor and Industry Regulations [*Green v. Sanitary Scale Company*, 296 F.Supp. 625 (E.D.Pa. 1969), vacated and remanded on other grounds, 431 F.2d 371 (3d Cir. 1970)], the trial judge instructed the jury as follows (at p. 628);

> "...you may consider whether the defendant should have followed these standards or ones similar to them when they designed their meat grinder...."

Citing *Smith, supra*, the Court explained the charge by stating (at p. 629):

> "... Since the defendant was charged in the complaint, *inter alia*, with negligent design of the meat grinding machine, the plaintiff was entitled to rely on any competent evidence tending to establish the minimum acceptable standard of design and construction. The aforementioned regulation clearly is relevant in this regard, provided that proper limiting instructions are given to the jury."

The Regulations in both the *Smith* and *Green* cases were used to determine an "acceptable standard of design" and to use this standard to decide either "lack of due care" or "*unreasonably dangerous*" is a distinction without a difference.

The instructions given by this Court when taken as a whole made clear to the jury that the Regulations *could be used* to set up a standard if they so decided to use it, and it properly instructed them that the Regulations were *not* to be considered as *binding* upon the Defendant.

C. The Unread Point

The Plaintiff's final contention that this Court erred in approving Defendant's Point for Charge No. 16 is without merit since there is no showing in the record that the Point was ever read to the jury. Therefore, regardless of the propriety of that Point, it does not constitute ground for a new trial since the jury was not exposed to it.

The other contentions raised in the Plaintiff's Motion but not argued, are without merit.

An appropriate Order will be entered denying the Motion.

...../s/ DANIEL J. SNYDER, JR.....
United States District Judge

Dated: June 16, 1976

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RUTH H. BUNN, Executrix of the Estate of Clair V. Bunn, Deceased,
Plaintiff

v.

CATERPILLAR TRACTOR COMPANY, a corporation,
Defendant

v.

ACE DRILLING COAL COMPANY, a corporation,
Third Party Defendant

Civil Action No. 74-637

ORDER

AND NOW, to-wit, this 16th day of June, 1976, after due consideration of the arguments and briefs of counsel and for the reasons set forth in the Opinion filed simultaneously herewith;

IT IS ORDERED, ADJUDGED AND DECREED that the Motion of the Plaintiff Ruth H. Bunn for New Trial be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion of the Defendant Caterpillar Tractor Company under Federal Rule of Civil Procedure 60 be and the same is hereby denied.

..../s/ DANIEL J. SNYDER, JR....
United States District Judge

EXCERPTS FROM OPINION

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA. CIVIL DIVISION

ORCA C. AZZARELLO,
Plaintiff

vs.

THE BLACK BROTHERS CO., INC., a corporation,
Defendant,

vs.

PARTS PROCESSING, INC., a corporation,
Additional Defendant

No. 924 April Term, 1972. In Trespass

(Filed December 10, 1975.)

BEFORE: DOYLE, LOUIK and G. ROSS, *JJ.*

OPINION

G. ROSS, *J.*

.....

Clearly, the *Berkebile* case precludes the inclusion of the phrase "unreasonably dangerous" when referring to what a plaintiff must establish in a §402A action. Although, as Black Brothers argues, *Berkebile* may not be a "majority" opinion, we must still apply its precepts to the instant controversy.

An examination of the court's charge indicates that the phrase "unreasonably dangerous" was frequently mentioned and appears in the transcript as follows:

.....

Therefore, plaintiffs are not precluded from presently asserting the *Berkebile* decision. As indicated heretofore, the

phrase "unreasonably dangerous" appeared frequently in the charge of the trial court, and it cannot be and it has not been asserted that said phrase was an insignificant factor in the deliberations of the jury. Consequently, on the basis of the foregoing, it is the conclusion of this Court, that the plaintiff must be granted a new trial to correct the erroneous charge below. Accordingly, an Order will be entered reflecting this conclusion.

.....

Order of the Superior Court of Pennsylvania affirming Azzarello v. Black Bros., et al.

ORCA C. AZZARELLO

v.

BLACK BROTHERS COMPANY, INC.,
Appellant

v.

PARTS PROCESSING, INC.

Superior Court of Pennsylvania

Argued April 15, 1976.

Decided July 19, 1976.

Appeal No. 401 April Term, 1976, from the Order of the Court of Common Pleas, Civil Division, of Allegheny County, at No. 924 April Term, 1972; Robert A. Doyle, Trial Judge, Maurice Louik and George H. Ross, Judges.

.....

Before WATKINS, President Judge, and JACOBS, HOFFMAN, CERCONE, PRICE, VAN der VOORT and SPAETH, *JJ*.

PER CURIAM:

Order affirmed.

THOMAS D. THOMSON
JOHN DAVID RHODES
ROBERT S. GRIGSBY
NORMAN J. COWIE
HERBERT GRIGSBY
GILES J. GACA
JOHN R. WALTERS, JR.
RALPH A. DAVIES
JANET N. VALENTINE
RICHARD E. RUSH
JOHN W. JORDAN IV
THOMAS A. MATIS
BRUCE E. WOODSKE
JAMES R. HARTLINE
GREGG P. OTTO
LINTON L. MOYER

JOHN R. BREDIN OF COUNSEL

THOMSON, RHODES & GRIGSBY
ATTORNEYS AT LAW
1724 FRICK BUILDING
PITTSBURGH, PENNSYLVANIA 15219

412-281-0737

BRANCH OFFICES
W. MIFFLIN, PA
MARS, PA

March 21, 1977

Re: Bunn vs. Caterpillar Tractor Co., et al.
No. 76-2083. Our File No. 9667-74.

T. F. Quinn, Esquire, Clerk
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Mr. Quinn:

This office represents appellee Caterpillar Tractor Co. in the above appeal.

.....

This is to advise that we have just learned that the Pennsylvania Supreme Court granted allocatur in the *Azzarello* case on February 9, 1977 and that an appeal has been entered in the Pennsylvania Supreme Court at No. 105 March Term, 1977.

.....

Thank you very much for your courtesy and cooperation.

Very truly yours,

Robert S. Grigsby

EXCERPTS FROM PENNSYLVANIA STANDARD JURY INSTRUCTIONS

8.01 (Civ) GENERAL RULE OF STRICT LIABILITY

The _____ of a product is [liable] [subject to liability] for the injuries caused to the plaintiff by a defect in the article which existed when the product left the possession of the _____. Such liability is imposed even if the _____ has exercised all possible care in the preparation and sale of the product.

8.02 (Civ) DEFINITION OF "DEFECT"

The _____ of a product is the guarantor of its safety. The product must, therefore, be provided with every element necessary to make it safe for use, and without any condition that makes it unsafe for use. If you find that the product, at the time it left the defendant's control, lacked any element necessary to make it safe for use or contained any condition that made it unsafe for use, then the product was defective, and the defendant is liable for all harm caused by such defect.

EXCERPTS FROM THE SUBCOMMITTEE'S NOTES

. . . . . .

Elimination of the unreasonably dangerous qualification for cases arising under Section 402A was challenged and rejected in *Beron v. Kramer Trenton Co.*, 402 F. Supp. 1268 (E.D.Pa. 1975) which declined to follow the Pennsylvania Supreme Court's decision in *Berkebile, supra.*[1] *Beron* does not address itself directly to the policy determinations in *Berkebile* of closing to the jury all considerations of negligence in Section 402A actions, nor does it examine the reasoning of *Cronin v. J. B. E. Olson Corp.*, 8 Cal. 3d 121, 104 Cal. Rptr. 43 501 P.2d 1153 (1972), or *Glass v. Ford Motor Company*, 123 N.J. Super. 599, 304 A.2d 362 (1973), cases cited by *Berkebile* in which the unreasonably dangerous requirement was similarly deleted in product liability cases.

. . . . . .

Berkebile was decided before all the justices of the Pennsylvania Supreme Court and no dissent was filed.

. . . . . .

All cases prior to *Berkebile* which are inconsistent with its expression of the law under Section 402A are clearly inapposite.

. . . . . .

---

[1] *Beron* narrowly held that under Pennsylvania law less than majority opinions, such as *Berkebile*, were entitled to no precedential weight. This holding totally ignores the philosophy expressed in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938); *accord, Meredith v. City of Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L.Ed. 9 (1943).

77-22

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-.....

RUTH H. BUNN, Executrix of the Estate of
Clair V. Bunn, Deceased,

Petitioner,

vs.

CATERPILLAR TRACTOR COMPANY,
a corporation,

Respondent,

vs.

ACE DRILLING COAL COMPANY, a corporation,
and
SOUTH FORK EQUIPMENT COMPANY, INC.,
a corporation.

BRIEF OF RESPONDENT CATERPILLAR TRACTOR COMPANY IN OPPOSITION TO PETITION OF RUTH H. BUNN, EXECUTRIX OF THE ESTATE OF CLAIR V. BUNN, DECEASED, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT S. GRIGSBY,
JANET N. VALENTINE,
THOMSON, RHODES & GRIGSBY,
1724 Frick Building,
Pittsburgh, Pennsylvania 15219,
Attorneys for Respondent,
Caterpillar Tractor Company.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON, SENIOR REPRESENTATIVE
HAROLD L. BERKOBEN, REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7463

INDEX.

TABLE OF CITATIONS.

CASES.

RULE.

MISCELLANEOUS.

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-....

RUTH H. BUNN, Executrix of the Estate of Clair V. Bunn, Deceased,

Petitioner,

vs.

CATERPILLAR TRACTOR COMPANY, a corporation,

Respondent,

vs.

ACE DRILLING COAL COMPANY, a corporation and SOUTH FORK EQUIPMENT COMPANY, INC., a corporation.

BRIEF OF RESPONDENT CATERPILLAR TRACTOR COMPANY IN OPPOSITION TO PETITION OF RUTH H. BUNN, EXECUTRIX OF THE ESTATE OF CLAIR V. BUNN, DECEASED, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Question Presented

Whether the United States Supreme Court should intervene when the United States Court of Appeals for the Third Circuit

refuses to accept a plaintiff's contention in a product liability case that an opinion joined in by only two justices of the Supreme Court of Pennsylvania effected a drastic change in the Pennsylvania law of product liability where there has been no further Pennsylvania appellate discussion or decision on the specific issue presented and, furthermore, where decisions of the Pennsylvania Supreme Court confirm that an opinion joined in by only two justices of said Court is not binding precedent even upon the state Courts of Pennsylvania.

Statement of the Case

This action was brought against defendant Caterpillar Tractor Company (hereinafter "Caterpillar") arising out of the death of Clair V. Bunn on October 11, 1973. Mr. Bunn was a supervisory employee of Ace Drilling Coal Company who died when allegedly a Caterpillar 988 Wheel Loader being operated by a fellow employee under Mr. Bunn's direction backed over him. Plaintiff's action was solely for allegedly defective design which is encompassed within § 402A of the Restatement of Torts 2d (hereinafter § 402A). § 402A was specifically adopted by the Supreme Court of Pennsylvania in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). Plaintiff contended the alleged "defects" were as follows: (1) the Wheel Loader was not equipped with a rear-view mirror; (2) it was not equipped with a functioning backup alarm; and (3) the position of the air cleaner and exhaust were such as to block partially the operator's view to the rear. There was *never* a contention made during the trial that the Wheel Loader malfunctioned or that it operated in any way other than the way it was supposed to operate. It was neither alleged nor contended that the machine was defectively manufactured. It was neither alleged nor contended that anything on the machine "broke" or "fell" or "snapped" or "failed" or did anything except what it was supposed to do.

The testimony at trial disclosed the following facts as to how the accident occurred.[1]

Michael R. Bolvin, a driller, worked with plaintiff's decedent, Mr. Bunn, at Ace Drilling Company (p. 3).[2] Bunn was in charge of the operation (p. 8) which involved the use of two 988 Wheel Loaders (p. 7) and nine men (p. 8). The work involved was the loading of coal into railroad cars, which operation involved repetitive backward and forward motions of the Wheel Loaders. Just before the accident, Bolvin was conferring with Bunn who had his back toward the Wheel Loader operated by Richard Rickard (p. 19). Bolvin, after receiving his instructions from Bunn, began to walk away from him (p. 20). He had gone about 10 or 15 feet (p. 20) when the noise made by the Wheel Loader caused him to turn around (pp. 21, 23), at which time he saw Bunn lying on the ground (p. 21) between the left front and rear wheels of the machine (p. 22). At that point Bolvin saw no evidence the machine had gone over Bunn (p. 22). Bolvin was then about

---

[1] The references are to pages in the original notes of testimony. When appellant below (petitioner herein) served a designation under Federal Rule of Appellate Procedure 30(b) of the proposed contents of her Appendix below, counsel for Caterpillar timely served upon appellant under said Rule a designation of additional testimony Caterpillar deemed necessary for inclusion in said Appendix, including testimony of Richard Rickard, the operator of the Wheel Loader, and Michael Bolvin, a fellow worker and eyewitness to the accident. Despite Caterpillar's designation, however, appellant/petitioner refused to include this factual testimony in the Appendix.

[2] All of the page references in this paragraph are to pages in the notes of testimony of Michael R. Bolvin given at trial on February 11, 1976, which is of record in this case.

20 feet from the Wheel Loader (pp. 23, 40). Bolvin ran toward the machine, which was then going in a forward motion (p. 40). He couldn't testify whether Bunn cried out or not because the machine was so noisy (p. 40), but he saw the left rear wheel of the machine on its forward motion scrape the side of Bunn's face and body (p. 40) before Bolvin was able to alert the driver and get the machine stopped (p. 41). Bolvin testified he knew the backup alarm on the machine was not functioning that day because he didn't hear it (p. 49). However, the sound of the machine's engine as it approached was so loud Bolvin instinctively turned around when he heard it (p. 50). There was nothing to block one's vision between the spot where he and Bunn had been talking and where the machine was being operated by Rickard (p. 50). Bunn had traveled some distance from the spot where he and Bolvin had talked to the spot where his body was found (p. 51). If Bunn had been walking in a *forward* motion between these two points (where he and Bolvin talked and where the accident occurred) he would have been able to see the 988 coming in a rearward direction toward him (p. 58). Even with all of the noise in the area Bolvin could distinguish the sound of the 988 Wheel Loader coming toward him (p. 54) and recognized the sound as the 988 (p. 55). He acknowledged that he (and, of course, Bunn too) shouldn't have been in that area because it was around a moving piece of equipment (p. 55). He and Bunn knew that where they were talking was near the rearward path of the 988 in its normal repetitive pattern that day (p. 56).

Richard Rickard, the operator of the 988 involved, testified that he didn't know where Bunn was when the 988 came in contact with him (p. 3)[3] but that 10 to 15 minutes

[3] All of the page references in this paragraph are to pages in the notes of testimony of Richard Rickard on recross examination given at trial on February 11, 1976, which is of record in this case.

before the accident he had told Bunn (his foreman) to stay out of the way because he (Rickard) couldn't see him and concentrate on what he was doing (p. 3). He and Bunn both knew that when used in a mining field the machine should have an audible backup alarm (pp. 3, 4). Bunn, the foreman, knew the backup alarm wasn't working but he told Rickard to go ahead and use the machine anyway (p. 4). This was prior to the time Rickard told Bunn he couldn't see him and asked that he stay out of the way because Rickard couldn't concentrate on Bunn and also operate the machine (p. 4). Rickard testified that if the 988 had had sideview mirrors at the time of the accident he wouldn't have used them anyway because he couldn't see as well using them (mirrors were installed by Ace Drilling Company after the accident) as he could by turning around and looking out the back of the machine (p. 4). Rickard also testified that by moving his head just a little to one side he could see past the exhaust stack and air cleaner (pp. 4, 5). Rickard acknowledged that there is a blind spot directly behind the machine and he testified that Bunn, who had operated the machine, also knew about the blind spot (pp. 5, 11). Just before the accident occurred, before Rickard began to move the 988 in reverse, he looked to the rear and on both sides of the air cleaner and stack and he did not see Bunn (p. 6). From where Bunn was standing (based upon location of his body after the accident) there was nothing to obstruct Bunn's view of the approaching machine (p. 7). The blind spot referred to was right up close to the machine and if Bunn had stayed where he and Bolvin had been talking, based upon Bolvin's testimony, Rickard could have seen him (p. 10). A person in the blind spot would be so close to the machine he could feel the heat from the engine (pp. 12, 13).

It was undisputed that the 988, originally sold by Caterpillar in 1969, was not equipped with rearview mirrors. The

988 also did not contain a backup alarm when originally sold, but a backup alarm had been completely installed on the machine by an employee of Ace Drilling Company several weeks *before* the accident (Testimony of Raymond C. Good, p. 4). According to Messrs. Bolvin's and Rickard's testimony, however, the alarm was not operating on the day of the accident and although Bunn knew this he ordered Rickard to operate the machine anyway (Rickard's testimony, p. 4).

The case was tried before the Honorable Daniel P. Snyder and a jury in the United States District Court for the Western District of Pennsylvania. The case was submitted to the jury on special interrogatories, the first of which was:

> "Was the Caterpillar 988 Wheel Loader in a defective condition at the time it was sold by Caterpillar Tractor Company to Cecil I. Walker Company, West Virginia, [the original owner] on January 28, 1969?"

After due deliberation the jury answered that question "No." Thus, after consideration of the testimony, the jury found the Wheel Loader was *not* in a defective condition at the time of sale[4] and a judgment was entered in favor of defendant Caterpillar. Plaintiff thereupon filed a motion for new trial, which motion was denied in an opinion and order dated June 16, 1976. Plaintiff thereupon appealed to the United States Court of Appeals for the Third Circuit which by judgment order dated April 6, 19[illegible] affirmed the judgment of

[4] In her petition to this Honorable Court, petitioner contends that "[T]he jury's answer determined that the defect in the machine which caused the fatal accident was not of that magnitude" [*i.e.*, not "unreasonably dangerous"] (Petition for Writ of Certiorari, p. 4). *This is clearly not correct.* The jury in fact found there was *no defect*, not, as petitioner would have this Court believe, that there was a defect that was only "reasonably dangerous". Petitioner, in effect, "presumes" a defect from the happening of the accident. The finders of fact found otherwise.

the district Court. Plaintiff's petition for rehearing was denied May 4, 1977. Plaintiff then petitioned for a stay of the mandate and a stay was granted until June 10, 1977 to allow plaintiff to prepare and file a petition for writ of certiorari to this Honorable Court. Said petition was received by counsel for Caterpillar on June 30, 1977.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. Contrary to the contentions of petitioner, the United States Court of Appeals for the Third Circuit has not in the instant case decided an important state question in a way in conflict with applicable state law.

The trial judge in the instant case charged the jury using verbatim language of § 402A of the Restatement of Torts 2d, adopted by the Supreme Court of Pennsylvania in *Webb v. Zern, supra.* That section reads in part as follows:

> "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer . . ."

Throughout the appeal, and in her petition to this Honorable Court, plaintiff/petitioner contends that the trial judge erred simply because he included the words "unreasonably dangerous" (as contained in § 402A) in the phrase "defective condition unreasonably dangerous" in his charge to the jury. This contention is based *solely* on the opinion of two justices of the Pennsylvania Supreme Court in

Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975).[5]

In *Berkebile*, then Chief Justice Jones of the Pennsylvania Supreme Court wrote, with only Justice Nix concurring with his opinion:

> "We hold today that the 'reasonable man' standard in any form has no place in a strict liability case. The salutory purpose of the 'unreasonably dangerous' qualification is to preclude the seller's liability where it cannot be said that the product is defective; this purpose can be met by requiring proof of a defect. *To charge the jury or permit argument concerning the reasonableness of a consumer's or seller's actions and knowledge,* even if merely to define 'defective condition' *undermines the policy considerations that have led us to hold in Salvador [Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974)] *that the manufacturer is effectively the guaranter of his products safety. The plaintiff must still prove that there was a defect in the product* and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous. *It is therefore unnecessary and improper to charge the jury on 'reasonableness'* . . ." 337 A.2d 893, 900 (Emphasis added).

Assuming *arguendo* that the above is now the law of Pennsylvania, and that is doubtful as discussed below, a review of the trial judge's charge in the instant case reveals he did *not* charge on the "reasonableness of a consumer's or seller's actions and knowledge" as referred to in *Berkebile* or on

[5] In her petition to this Court, petitioner claims additional Pennsylvania appellate authority for her contention, but in fact there is none, as is more fully discussed herein. Petitioner also cites (R. 21 of petition) excerpts from notes of a subcommittee which drafted proposed jury instructions, which have not been adopted. Clearly these subcommittee notes have no binding effect.

"reasonableness" of the defect, if any. Although he quoted from the language of § 402A, including the words "defective condition unreasonably dangerous to the user or consumer" (Appendix,[6] pp. 405a, 410a, 414a) he did not charge that the jury could find the Wheel Loader was "reasonably defective" or "reasonably dangerous" and yet absolve Caterpillar from liability. It is clear from the charge taken as a whole that the phrase "defective condition unreasonably dangerous" was given as a unitary concept to aid the jury, as intended by the drafters of the Restatement, to determine whether or not the *design* was defective. For example, at page 73 of the charge (p. 405a) the trial judge referred to plaintiff's contention the Wheel Loader "was defective in design . . . *which rendered it unreasonably dangerous*" (the latter flowing automatically from the former) and again that the Wheel Loader "was defective *and* unreasonably dangerous" (p. 405a) (Emphasis added). Unlike cases wherein there are allegations of malfunction or of manufacturing defects,[7] in an allegedly defective design case how is the jury to determine what *is* defective design unless they receive some guidance from the Court, *guidance lifted directly from § 402A?* The jury here was not asked to make a determination whether a defective condition was "reasonable." The jury was asked to decide whether defendant's design was "defective."[8] In fact, questions 1 and 2

[6] References to page numbers followed by "a" are to pages in the Appendix in the Court of Appeals.

[7] It is important to distinguish *Berkebile, supra,* from the instant case because *Berkebile* involved claims of not only defective design but *also* claims of defective manufacture, inadequate warnings, and misrepresentation of the safety of the machine. Those latter claims were not involved in the instant case.

[8] The Court's attention is respectfully invited to the fact that it could hardly be contended, and it was *not* contended, by Caterpillar or anyone else that the Wheel Loader, *if defective,* was not also unreasonably dangerous. Such a position would be untenable, if only becuase of the size of the machine. It would seem clear to anyone that *if* the Wheel Loader was defectively designed it was also unreasonably dangerous.

submitted to the jury in this case (p. 428a) are precisely the two questions referred to by Chief Justice Jones in *Berkebile* (1) was the product defective and (2) was the defect the proximate cause of the injuries? 337 A.2d 893, 898.

Chief Justice Jones in *Berkebile* acknowledges the validity of comment (i) to § 402A (337 A.2d 893, 899) which was in substance included in the trial judge's charge in this case (pp. 412a, 413a). Comment (i) is based upon common sense and acknowledgees that "[m]any products cannot be made entirely safe for all consumption. . . ." The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. § 402A Restatement, Comment (i). The Comment refers to whiskey, sugar, and tobacco among other things, as items that cannot be made entirely safe for all consumption. In *Berkebile*, Chief Justice Jones acknowledges this:

> ". . . the plaintiff cannot recover if he proves injury from a product absent proof of defect, such as developing diabetic shock from eating sugar or becoming intoxicated from drinking whiskey." 337 A. 2d 893, 898.
>
> * * *
>
> "The seller of a product is not responsible for harm caused by such inherently dangerous products as whiskey or knives that despite perfection in manufacture, design or distribution, can cause injury." 337 A.2d 893, 899.

It is, of course, impossible to design a Wheel Loader which is incapable of injuring someone. It is a huge machine operated by a fallible human being, with possibly other fallible human beings working around it. Like a knife it has inherent capacity to injure in the hands of a human being. This capacity arises not necessarily from any defect in the machine

but arises because human beings are fallible. If a Wheel Loader is capable of *moving* it is capable of injuring someone. Thus it falls squarely within the category of products referred to in Comment (i) and the instruction based upon that comment was proper and necessary "to differentiate those products which are by their very nature unsafe but not defective from those which can truly be called defective." *Berkebile, supra,* 337 A.2d 893, 899.

The issue raised by plaintiff in the instant case is precisely the one faced by the U. S. District Court for the Eastern District of Pennsylvania in *Beron v. Kramer-Trenton Co.*, 402 F.S. 1268 (1975), affirmed by the Court of Appeals for the Third Circuit on June 22, 1976, No. 75-2407. That case, like the instant one, was based purely on allegedly defective design and plaintiff in his motion for new trial argued that the trial Court had erred in using the "unreasonably dangerous" language in its charge in view of the *Berkebile* decision.[9] In a scholarly and well-reasoned opinion, Judge Huyett while acknowledging that a "duty rests upon the federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court" (402 F.S. 1268, 1272) held that the simple use of the words "unreasonably dangerous" does not constitute reversible error. The following excerpts from Judge Huyett's opinion are particularly pertinent and, it is submitted, compelling in their logic and reason:

---

[9] One item in *Beron* distinguishes it from this case. In footnote 5 of the opinion, discussing a dialogue with the jury after verdict Judge Huyett speculates that the jury might in that case have found a "mere defect . . . which is not unreasonably dangerous to the user." 402 F.S. 1268, 1271 (fn. 5). Nothing in the instant case, either in the charge or anywhere else, indicates the jury here might have found a "mere defect." The jury here found *no* defect.

"Since the Court [in Berkebile] does not disavow § 402A and since 'unreasonably dangerous' is not expressly deleted, it may be that a jury charge, carefully phrased so that the danger that fault notions will influence the jury is minimized, would survive scrutiny under *Berkebile.*"

* * *

". . . an examination of Pennsylvania appellate decisions interpreting § 402A reveals that the test and the comments, including in particular comments g, h and i, have been solidly engrafted into Pennsylvania law without reservation. *In the absence of an unequivocal rejection of any specific aspect of § 402A by a majority of the Pennsylvania Supreme Court we hesitate to impute such an intention to that Court.* . . . We believe that the phrase 'defective condition unreasonably dangerous to users' is a unitary concept and that the purpose of the draftsmen would be frustrated by severing from it 'unreasonably dangerous' without substituting another suitable phrase which tends to clarify the meaning of 'defective condition.' In our view the inclusion of 'unreasonably dangerous' serves two overlapping functions in the § 402A formulation of strict liability. We believe it denotes that the draftsmen of the Restatement intended to foreclose the possibility that 'defective condition' might be construed to include any characteristic of a product capable of inflicting injury. In addition, it signifies that jurors should not resort to their intuitive understanding of 'defective condition' but rather that they should be guided by an objective standard based on community expectations of product safety . . ."

* * *

"In the decade since § 402A was adopted the Pennsylvania Supreme Court has expressed unqualified approval for the language and the comments of § 402A, where doubts arose as to its proper interpretation [footnote omitted]. By contrast, the Pennsylvania high court has *never* rejected the language of the comments." 402 F.S. 1268, 1273-74. (Emphasis added.)

* * *

". . . in a 402A case where the jury is asked to determine whether a product was in a defective condition, a jury would have to resort to bare intuition if it were given no standard by which to gauge whether a particular product was sold in a defective condition. . . . No constructive social policy would be fostered by permitting juries with an overly broad intuitive understanding of defective condition to render the seller of a product an insurer against any and all injuries thereby caused. . . . Despite the use of words that in a sense 'ring in negligence,' careful jury instructions modeled after comments g, h and i of § 402A properly focus the jury's attention on the *condition* of the product; the *conduct* of both the seller and the consumer are made irrelevant. In that sense, then, the essential distinction between negligence and strict liability is preserved." 402 F.S. 1268, 1275-76. (Emphasis in original.)

In the instant case the trial judge very specifically instructed the jury that § 402A applied "although the seller has exercised all possible care in the preparation and sale of his product" (p. 410a) and, as stated above, there was no portion of the charge in the § 402A aspect of the case which dealt with the "reasonableness" of the *conduct* of the seller or consumer. The focus at all times was on the *condition* of the Wheel Loader and the question to be answered was "Was it defective?"

There is another compelling reason why *Berkebile* should not and cannot have the effect petitioner seeks to give it. Although the Pennsylvania Supreme Court was unanimous in declaring in *Berkebile* that the trial Court had erred and that there should be a new trial, only two of the seven justices (Chief Justice Jones and Justice Nix) signed the opinion of the

Court. Justice Pomeroy wrote a separate concurring opinion (stating the lack of adequate warnings may make a perfectly made product *"unreasonably dangerous"* 337 A.2d 893, 904) as did Justice Roberts. Justices Eagan, O'Brien and Manderino merely concurred in the result.

Here, again, the opinion of District Court Judge Huyett in *Beron, supra,* is compelling in its analysis of the effect of this two-justice opinion:

> "Since we draw no inferences from the concurring opinions or from the unexplained concurring votes, the *Berkebile* opinion represents the personal views of only two members of the Court, less than a majority of those justices of the Pennsylvania Supreme Court sitting on the case. Consequently we accord no precedential value to the opinion, and we treat Pennsylvania strict liability law as unchanged. *Burak v. Commonwealth,* 339 F. Supp. 534 (E.D.Pa. 1972).
>
> "Our approach is fully consonant with Pennsylvania's own law concerning the precedential weight of its less than majority opinions. In *Commonwealth v. Little,* 432 Pa. 256, 248 A.2d 32 (1968), the Pennsylvania Supreme Court declined to follow a prior opinion which represented the views of only two justices in a four man majority, stating: '[t]hat opinion, joined by only one other member of this Court, has no binding precedential value.' 432 Pa. at 260, 248 A.2d at 35. Several years later the Court, refusing to rely on a minority opinion, stated that such an opinion 'did not express the views of a majority of the Court, and, therefore, is not decisional.' *Commonwealth v. Silverman,* 442 Pa. 211 (n.8), 275 A.2d 308 (n.8) (1971)" 402 F.S. 1268, 1276.
>
> • • •
>
> ". . . we think the Pennsylvania Supreme Court would take the following approach: in interpreting the split opinion of a Pennsylvania appellate court one must add

> up the votes on each issue addressed by an opinion of the court; only those holdings which muster majority approval may be accorded precedential value. Thus, where, as in *Berkebile,* an opinion addresses several different issues, and where no part of the opinion appears to have the approval of a majority, the opinion reflects only the personal views of its author and is not endowed with the force of law. We therefore hold that the views expressed in Chief Justice Jones' opinion in *Berkebile* are not the law of Pennsylvania, and that it is proper to instruct a jury that it must find that a defective condition be unreasonably dangerous to the user or consumer. Accordingly, plaintiff's motion for a new trial is denied." 402 F.S 1268, 1277.

In her petition in this Honorable Court, petitioner cites several other Pennsylvania decisions which, she contends, preclude the use of the phrase "unreasonably dangerous" in a charge to the jury in a § 402A case. An analysis of these decisions reveals, however, that such is not the case.

Petitioner relies upon an unreported opinion of the Court of Common Pleas of Allegheny County in *Azzarello v. Black Brothers Co., Inc.,* No. 924 April Term, 1972, affirmed *per curiam without opinion*[10] by the Superior Court of Pennsylvania, 240 Pa. Super. 956, 359 A.2d 897 (1976). The lower court in *Azzarello* ordered a new trial in a product case wherein the trial judge, in the opinion he wrote in the lower Court (see Appendix hereto), stated that he charged the jury that unreasonably dangerous "is the key phrase in this type of case"; that "the focal issue" was whether the lack of safety devices "created an unreasonable danger to the operator"; that the "test of unreasonably dangerous is whether a reasonable

---

[10] At page 7 of her petition to this Honorable Court petitioner refers to a "per curiam opinion" of the Pennsylvania Superior Court in *Azzarello.* In fact, there was no Superior Court opinion, but only an order.

manufacturer would continue to market his product in the same condition." Clearly, no such instructions were given in the instant case. Moreover, in Pennsylvania the trial judge has great discretion in deciding whether or not to award a new trial. It has been stated that the granting of a new trial is an inherent power and immemorial right of the trial Court and an appellate Court will not find fault with the exercise of such authority in the absence of a clear abuse of discretion. *Micozzi v. Klysh,* 207 Pa. Super. 77, 215 A.2d 263 (1963). The granting of a new trial in a trespass action because the judge feels he did not properly instruct the jury does not constitute an abuse of discretion. *Mohr v. Plotkin,* 186 Pa. Super. 615, 142 A.2d 414 (1958). Furthermore, Pennsylvania appellate Courts have stated on numerous occasions that the presumption is that the trial Court was justified in granting a new trial even when the reason given is insufficient, unless it is expressly stated to be the only reason. *Bellettiere v. City of Philadelphia,* 367 Pa. 638, 81 A.2d 857 (1951); *Mohr v. Plotkin, supra; Seidel v. Borough of Yeadon,* 19 Pa. Super. 370, 155 A.2d 370 (1959). A Pennsylvania appellate Court may affirm the judgment of the lower Court if it is correct on any legal ground or theory disclosed by the record, regardless of the reason advanced by the trial Court or even if the appellate Court does not necessarily agree with the reasons for the trial Court's judgment. *Moss Rose Manufacturing Co. v. Foster,* 226 Pa. Super. 448, 314 A.2d 25 (1973). A treatise on Pennsylvania law states in part:

> "The fact that the court, in granting a new trial, refers to certain reasons for its action will not be treated on appeal as conclusive that the matters referred to alone controlled the decision, even though only a single question or point in the case is indicated or referred to." 9 Standard Pennsylvania Practice, pp. 407-408.

Thus, in view of the well-established principles cited above, it is not surprising that in the *Azzarello* case the action of the lower Court in granting a new trial was affirmed by the Superior Court, 240 Pa. Super. 956, 359 A.2d 897 (1976). The Superior Court affirmance was by *per curiam* order *with no opinion whatsoever.* Absent an express opinion by the judges of the Superior Court it cannot be said that their order in *Azzarello* represents anything more than their decision that the lower Court did not commit a palpable abuse of discretion in awarding a new trial in that particular case, for whatever reason. The case obviously presented the Superior Court with an *opportunity* to write an opinion on the questions raised as a result of Chief Justice Jones' opinion in *Berkebile, supra,* but, curiously, the Superior Court declined the opportunity.

It is respectfully submitted, that the mere *order,* without opinion, of the Superior Court affirming the award of a new trial in the *Azzarello* case cannot be construed as a definitive pronouncement of a change in the law of Pennsylvania as it clearly existed prior to said order. In this regard, the Court's attention is respectfully invited to the following discussion in 9 Standard Pennsylvania Practice:

> "Generally speaking, an appellate court reviews judgments and decrees and not the reasons on which they are based. In many cases, if the judgment or decree of the lower court is correct it is of little moment what led up to it, and the reasons given by the trial judge for arriving at it are unimportant.
>
> "Although it is a general rule of practice that a point not presented to the court below cannot be urged on appeal to obtain a reversal, it is equally well established that a correct judgment will be sustained for any reason which supports it, particularly where the ground was for-

mally presented to the trial court, though not there acted on. Hence if, for any reason presented by the record, the decree appealed from can be supported, it should be upheld even though the lower court has failed to assign such reason for it or even though it has given no reason whatever for the decree.

"An appellate tribunal looks at the merits of a decree or judgment brought before it for review and will not reverse merely because some or all of the reasons relied on by the court below are not tenable. In other words, a bad reason does not invalidate a good ruling and a good judgment will be affirmed although the reasons given for it by the court below may be wrong." 9 Standard Pennsylvania Practice, p. 496. (Footnotes omitted.)

It is clear that the trial court's opinion in *Azzarello* is not binding on this Court because a decision of a Pennsylvania Common Pleas Court is not binding upon a federal Court in a diversity case. *King v. Order of United Commercial Travelers of America,* 333 U.S. 153, 68 S. Ct. 488, 92 L.Ed. 608 (1948); *Berkshire Land Co. v. Federal Security Co.,* 199 F.2d 438 (C.A. 3, 1952). A Pennsylvania Common Pleas Court decision is not even binding on another Pennsylvania Common Pleas Court.

The Pennsylvania Supreme Court, while the instant appeal was pending in the Court of Appeals, granted allocatur in the *Azzarello* case, but as of the present time has not heard argument thereon.[11] The *Azzarello* case, therefore, cannot be

[11] Footnote 5 of petitioner's petition in this Court seems to suggest the Court of Appeals should have awaited the Pennsylvania Supreme Court decision in *Azzarello* before deciding the instant case. This is somewhat ironic in view of the fact that petitioner's counsel also represents the plaintiff in *Azzarello* but it was counsel for respondent Caterpillar *not* counsel for petitioner who advised the Court of Appeals of the grant of allocatur in *Azzarello* (See letter dated March 21, 1977 from Robert S. Grigsby to Clerk of the Court of Appeals in Appendix).

said to preclude a federal Court in Pennsylvania from using the phrase "unreasonably dangerous" in a charge to the jury in a product case.

Petitioner's contention that the opinions in *Lenkiewicz v. Lange,* 242 Pa. Super. 87, 363 A.2d 1172 (1976), *Cornell Drilling Co. v. Ford Motor Company,* 241 Pa. Super. 129, 359 A.2d 822 (1976), and *Francioni v. Gibsonia Truck Corp.,* .... Pa. ...., 372 A.2d 736 (1977) preclude the use of the phrase "unreasonably dangerous" is likewise without merit. The Pennsylvania Superior Court in *Lenkiewicz,*[12] *supra,* and *Cornell, supra,* cites the *Berkebile* opinion, as well as other earlier opinions, for certain well-established principles of law regarding product liability, all of which principles were established *before Berkebile.* Neither *Lenkiewicz* opinion (there are two, including the concurring opinion) discusses, directly or indirectly, the issue of the effect of the words "unreasonably dangerous" as contained in §402A. Nor does the opinion in the *Cornell* case discuss the "unreasonably dangerous" aspect in connection with §402A, although the opinion cites *Berkebile* for other basic principles applicable to a product liability case. The mere citation of *Berkebile* by another appellate Court, especially for specific principles which are well established and which have been enunciated in prior cases likewise cited, is not authority for the proposition petitioner advances, *i.e.,* that the later Court adopts the *Berkebile* opinion *in toto.* And petitioner concedes (at page 10 of her petition) that the *Berkebile* opinion is not even cited by the Pennsylvania Supreme Court in its opinion in the *Francioni* case, *supra.* With respect to that case also, petitioner points to no discussion of the "unreasonably dangerous" language contained in §402A.

[12] As in *Berkebile,* the opinions in *Lenkiewicz* are less-than-majority opinions and thus not clearly definitive pronouncements of Pennsylvania law in any event.

In short, the recent Pennsylvania cases cited by petitioner do indeed stand for the proposition (established before *Berkebile*)[13] that plaintiff's burden in a product case is to establish (1) that a defect existed in the product at the time of delivery by the seller and (2) that the defect was a proximate cause of the plaintiff's harm. The trial judge in the instant case was clearly guided by these principles as his instructions to the jury indicate. The first interrogatory submitted to the jury was in accord with these principles:

> "Was the Caterpillar 988 Wheel Loader in a defective condition at the time it was sold . . .?"

After an extended trial the fact finders answered that interrogatory in the negative. The judgment entered for defendant upon that finding was properly affirmed by the Court of Appeals for the Third Circuit. It is respectfully submitted that petitioner has failed to demonstrate that the Court of Appeals' decision in the instant case was in conflict with applicable Pennsylvania law. Respondent Caterpillar Tractor Company further respectfully submits that petitioner's petition for writ of certiorari should therefore be denied.

---

[13] See, for example, *Kuisis v. Baldwin Lima Hamilton*, 457 Pa. 321, 319 A.2d 914 (1974); *Oehler v. Davis*, 223 Pa. Super. 333, 298 A.2d 895 (1972).

Conclusion

Neither the opinion of two justices of the Pennsylvania Supreme Court in *Berkebile v. Brantly Helicopter Corp., supra,* nor the opinions in *Azzarello v. Black Brothers Co., Inc., supra, Lenkiewicz v. Lange, supra, Cornell Drilling Co. v. Ford Motor Co., supra* and *Francioni v. Gibsonia Truck Co., supra,* compel this Honorable Court to grant certiorari. The decision of The United States Court of Appeals for the Third Circuit in the instant case was a proper one and fully in accord with applicable Pennsylvania law.

Respectfully submitted,

ROBERT S. GRIGSBY,
JANET N. VALENTINE,
THOMSON, RHODES & GRIGSBY,
Attorneys for Respondent,
Caterpillar Tractor Company.

APPENDIX

Complete text of letter from Robert S. Grigsby, Esquire, to T. F. Quinn, Clerk of the United States Court of Appeals for the Third Circuit dated March 21, 1977.

THOMSON, RHODES & GRIGSBY
Attorneys at Law
1724 Frick Building
Pittsburgh, Pennsylvania 15219

412-281-0737

March 21, 1977

Re: Bunn vs. Caterpillar Tractor Co., et al.
No. 76-2083. Our File No. 9667-74.

T. F. Quinn, Esquire, Clerk
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Mr. Quinn:

This office represents appellee Caterpillar Tractor Co. in the above appeal.

Counsel for appellant in this case relies very heavily in his original brief upon an unreported decision of Judge George

Ross of the Court of Common Pleas of Allegheny County in the case of *Azzarello v. Black Brothers Co., Inc.*, which decision was affirmed per curiam without opinion by the Pennsylvania Superior Court at .... Pa. Super. ....., 359 A.2d 897 (1976). Counsel for appellant herein also represents the plaintiff in the *Azzarello* case and he attached copies of Judge Ross' opinion and the Superior Court order in that case to his original brief.

This is to advise that we have just learned that the Pennsylvania Supreme Court granted allocatur in the *Azzarello* case on February 9, 1977 and that an appeal has been entered in the Pennsylvania Supreme Court at No. 105 March Term, 1977.

We believe the attention of the Court should be invited to this important recent development in the *Azzarello* case and in a telephone call to your office were advised that this letter would be the appropriate means to accomplish this. If this information is incorrect, please let us know immediately.

Thank you very much for your courtesy and cooperation.

Very truly yours,

ROBERT S. GRIGSBY.

RSG:rk

cc: John E. Evans, Jr., Esquire
H. Fred Mercer, Esquire

Complete text of opinion of Court of Common Pleas of Allegheny County, Pennsylvania, in Azzarello v. Black Brothers Co., Inc. at No. 924 April Term, 1972 (filed December 10, 1975).

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania

Civil Division

ORCA C. AZZARELLO,

Plaintiff,

vs.

THE BLACK BROTHERS CO., INC.,
a corporation,

Defendant,

vs.

PARTS PROCESSING, INC., a corporation,
Additional Defendant.

No. 924 April Term, 1972
In Trespass
(Filed December 10, 1975.)

Before: Doyle, Louik and G. Ross, *JJ.*

G. Ross, *J.*

The above captioned matter was tried before the Honorable George H. Ross and resulted, on April 9, 1975, in a verdict in

favor of the plaintiff, Orca C. Azzarello, in the sum of $125,000.00 against the additional defendant, Parts Processing, Inc. (Parts Processing), and a verdict in favor of the original defendant, The Black Brothers Co., Inc. (Black Brothers). Parts Processing was the employer of the plaintiff. At present, this matter is before this Court en Banc on the plaintiff's motion for a new trial.

In support of the aforesaid motion, plaintiff asserts the following two contentions: (1) the trial court gave inconsistent instructions with respect to the possibility of a joint verdict against both Parts Processing and Black Brothers; and (2) in light of the recent case of *Berkebile v. Brantly Helicopter Corporation,* .... Pa. ...., 337 A.2d 893, filed May 19, 1975, the trial court incorrectly instructed the jury that the plaintiff had the burden to establish, under §402A strict liability, that the allegedly defective machine was unreasonably dangerous.

We will first focus upon plaintiff's second contention, as set forth above.

In *Berkebile,* supra, at page 900 of the Atlantic Reporter, Chief Justice Jones writes:

> We hold today that the "reasonable man" standard in any form had no place in a strict liability case. The salutary purpose of the "unreasonably dangerous" qualification is to preclude the seller's liability where it cannot be said that the product is defective; this purpose can be met by requiring proof of a defect. To charge the jury or permit argument concerning the reasonableness of a consumer's or seller's actions and knowledge, even if merely to define "defective condition" undermines the policy considerations that have led us to hold in *Salvador* that the

> manufacturer is effectively the guarantor of his product's safety. The plaintiff must still prove that there was a defect in the product and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous. It is therefore unnecessary and improper to charge on "reasonableness".

Clearly, the *Berkebile* case precludes the inclusion of the phrase "unreasonably dangerous" when referring to what a plaintiff must establish in a §402A action. Although, as Black Brothers argues, *Berkebile* may not be a "majority" opinion, we must still apply its precepts to the instant controversy.

An examination of the court's charge indicates that the phrase "unreasonably dangerous" was frequently mentioned and appears in the transcript as follows:

> (1) "... one who sells any product in a defective condition, unreasonably dangerous to the user, is subject to liability ..." (T.8)
>
> (2) "... the plaintiff must prove that the defendant sold the product involved in a defective condition, unreasonably dangerous to the user ..." (T.9)
>
> (3) "By a defective condition is meant that the product at the time it leaves the seller's hands in a condition not contemplated by the ultimate user, which will be unreasonably dangerous to him, and you will hear all during this charge the phrase unreasonably dangerous, and that is the key phrase in this type of case." (T.10)
>
> (4) "A properly made product is defective if its design is unreasonably dangerous. The prevailing interpretation

> of defective is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety." (T.11)
>
> (5) "...a manufacturer may be liable under 402A for a design which creates an unreasonable risk of danger to the user. ...but the design is considered defective only if the design makes the product unreasonably dangerous. Hence, the focal issue in this case is whether or not the absence of infeed guards or the safety devices on the machine, ...created an unreasonable danger to the operator." (T.12)
>
> (6) "The focal issue in these cases is whether the absence of safety devices created an unreasonable danger to the operator." (T.12, 13)
>
> (7) "It is reasonable to require reasonable care to protect even the buyer himself or the user from what may be foreseen as an unreasonable danger to him. Unreasonably dangerous to the user or consumer is the nature of the defective condition. The product must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it or uses it with the ordinary knowledge common to the community as to its characteristics. The test of unreasonably dangerous is whether a reasonable manufacturer would continue to market his product in the same condition ..." (T.14)

In addition to the above instances, said phrase appeared in plaintiff's points for charge number one; and also appeared in original defendant, Black Brothers', points for charge number two.

The plaintiff took a general exception and also took a specific exception, as set forth immediately below, on an aspect of contributory negligence, which embodied the correct statement of the law with respect to the plaintiff's burden of proof:

> "I ask the court to instruct the jury that plaintiff is entitled to recover from Black Brothers if the jury determines that the machine was defective and that she was injured as a proximate result of that condition, even though she were guilty of fault or contributory negligence and such would not be a bar to her right of recovery against Black Brothers." (T.50, 51)

Black Brothers argues in opposition that the above specific exception was insufficient because it was directed, not to the "unreasonably dangerous" issue, but, rather, was directed to the issue of contributory negligence. Furthermore, submits Black Brothers, the case of *Dilliplaine v. Lehigh Valley Trust Company,* 457 Pa. 225, 322 A.2d 114 (1974) eliminated the doctrine of basic and fundamental error, and now a specific exception must be taken to an allegedly erroneous jury instruction. Since no such exception was taken, Black Brothers urges the conclusion that the plaintiff was satisfied with the court's charge on the then known law.

We look to the case of *Kuchinic v. McCrory,* 422 Pa. 620 (1966), for guidance. *Kuchinic* involved an airplane crash which caused the death of several passengers. Suit was commenced against the estate of the pilot. Pursuant to the then prevailing Pennsylvania law of conflicts, Georgia law, which required a showing of gross negligence by a guest passenger, was applied. The plaintiffs were unsuccessful. The intervening decision of *Griffith v. United Airlines,* 416 Pa. 1 (1964) changed the law of conflicts in Pennsylvania and, under this change, Pennsylvania law, which placed a lesser burden on guest passengers, that of simple negligence, would be applicable in *Kuchinic.* No specific exception had been taken by the plaintiffs. On appeal, plaintiffs raised the issue of the change in Pennsylvania law. The defendant-appellee argued that plaintiffs were precluded from challenging the charge of the trial court because they had agreed to the application of Georgia law. In response to this the Supreme Court wrote, on page 626 of *Kuchinic,* supra, granting plaintiffs a new trial:

> . . . the present case, of course is one where an earlier objection would have been to no avail, because the charge correctly stated prevailing law. Furthermore, the rule espoused by appellee would compel counsel to urge upon the trial court every conceivable theory, on the mere chance that, before his case is finally concluded one such theory might become the law. Since, by hypothesis, the trial court would have to overrule any objection based on his failure to adopt one of these theories, on appeal, the winning party below would be in the same position as the instant appellee. Indeed this requirement would tend to delay justice, for the court below would still have to consider the rule on each theory. Therefore, we are unwilling to conclude that the appellants' failure to interject the rationale of Griffith into the trial constitutes waiver and precludes them from now seeking the benefit of that decision.

In the instant controversy, as in *Kuchinic,* supra, the plaintiff-appellant's failure to take a specific exception to the trial

court's use of the phrase "unreasonably dangerous" and thereby inject the *Berkebile* decision, cannot be viewed as a waiver because, such an exception, even if properly taken, would have been for naught.[1] Therefore, plaintiffs are not precluded from presently asserting the *Berkebile* decision. As indicated heretofore, the phrase "unreasonably dangerous" appeared frequently in the charge of the trial court, and it cannot be and it has not been asserted that said phrase was an insignificant factor in the deliberations of the jury. Consequently, on the basis of the foregoing, it is the conclusion of this Court, that the plaintiff must be granted a new trial to correct the erroneous charge below. Accordingly, an order will be entered reflecting this conclusion.

In light of the aforesaid, it is unnecessary to address the first contention raised by the plaintiff in support of the within motion.

---

[1] In *Dilliplaine*, supra, the Supreme Court reasoned, at page 116 of the Atlantic Reporter, that, "Requiring a timely specific objection to be taken in the trial court will ensure that the trial judge has a chance to correct alleged trial errors. This opportunity to correct alleged errors at trial advances the orderly and efficient use of our judicial resources." In the instant case, a timely objection based on a change in the law yet to occur, in addition to being futile (as pointed out in *Kuchinic*, supra), would demand a clairvoyant ability beyond that of even the most skilled advocate.

ORDER OF COURT

AND NOW, to-wit, this 9th day of Dec., 1975, after oral argument and full consideration of the briefs submitted by the parties, it is hereby ORDERED, ADJUDGED and DECREED that the Motion of the plaintiff, Orca C. Azzarello, for a New Trial is granted.

By the Court:

G. ROSS, *J.*

Eo die, Exceptions noted to all parties and bill sealed.

G. Ross, *J.*